LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 31 1971
ROBERT SEAVER, CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted] 70-72

UNITED STATES OF AMERICA,

Petitioner,

—against—

CHAS. PFIZER & CO. INC., AMERICAN CYANAMID COMPANY and BRISTOL-MYERS COMPANY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN E. F. WOOD
140 Broadway
New York, N. Y. 10005
Attorney for Respondent
Chas. Pfizer & Co., Inc.

Of Counsel:

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD

CONNOLLY, BOVE & LODGE

ROY W. McDONALD
2 Wall Street
New York, N. Y. 10005
Attorney for Respondent
American Cyanamid Company

Of Counsel:

DONOVAN LEISURE NEWTON
& IRVINE

MERRELL E. CLARK, JR.
40 Wall Street
New York, N. Y. 10005
Attorney for Respondent
Bristol-Myers Company

Of Counsel:

WINTHROP, STIMSON, PUTNAM
& ROBERTS

FISH & NEAVE

March 31, 1971

INDEX

	PAGE
Opinions Below and Jurisdiction	1
Questions Presented	1
Statement	2
Summary of Argument	4
ARGUMENT	6
I. No Adequate Reasons Are Given for Granting the Petition and There Are Affirmative Reasons for Its Denial	6
II. The Decision Below Is Correct and Does Not Raise Points of Law Which Warrant Review by This Court	10
A. The Nature and Scope of the Decision	10
B. Particular Defects in the Trial Found by the Court of Appeals	12
1. The trial court's treatment of the evidence as to Parke, Davis	12
2. The trial court's emphasis on assertions of profiteering	17
3. The trial court's treatment of the officers' testimony	19
4. The trial court's emphasis on assertions of patent fraud	25
5. The trial court's treatment of the patent licenses to Squibb and Upjohn	26

PAGE

6. The trial court's treatment of the evidence as to Bristol's concededly non-conspiratorial conduct 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases:

Bollenbach v. *United States*, 326 U.S. 607 (1946) 28

Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 7

Glasser v. *United States*, 315 U.S. 60 (1942) 2

United States v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 39 U.S.L.W. 3376 (March 1, 1971) 9-10, 22

United States v. *Johnston*, 268 U.S. 220 (1925) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1286

UNITED STATES OF AMERICA,

Petitioner,

—against—

CHAS. PFIZER & CO. INC., AMERICAN CYANAMID COMPANY and BRISTOL-MYERS COMPANY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below and Jurisdiction

The opinions below and the basis for this Court's jurisdiction are set forth in the petition (Pet. 1-2) and appendix thereto (App. 1a-43a).*

Questions Presented

The petitioner contends that there are two questions presented and that the first one is "whether * * * the court of appeals applied an improper standard of review by considering particular language in isolation rather than

---

* App. refers to the appendix to the petition for certiorari; R. refers to volumes I through XXI of the joint appendix in the court of appeals.

evaluating the charge in its entirety in the light of all the evidence and the defendants' arguments to the jury." (Pet. 2)

We disagree. There is nothing in the opinions below to support the assertion that the court of appeals considered particular language "in isolation" or failed to "evaluate the charge in its entirety" or failed to consider "all the evidence and the defendants arguments to the jury." To the contrary, the majority below refers to its "review of the *entire charge*" (App. 17a) (italics ours) and concludes with the express statement:

> "A review of the *entire record* leads to the conclusion that the judgments of conviction against Cyanamid, Pfizer and Bristol must be reversed and that a new trial be had as to them." (App. 33a) (italics ours)

In the second question presented the petition purports to describe each of the grounds relied on by the court of appeals. The attempt to summarize the holding in a few words is neither complete nor entirely accurate, as will appear in our discussion of the rulings in question.

Statement

The petition states the facts "in the light most favorable to the verdict" (Pet. 4). Whatever the appropriateness of such an approach if this Court were now called upon to decide the sufficiency of the evidence to support the verdict (*Glasser* v. *United States,* 315 U.S. 60 (1942)), the usefulness of such a one-sided statement is dubious in a case such as this, where the court of appeals' decision was based on prejudicial errors in the charge to the jury. A

balanced synopsis of the facts is contained in the first opinion of the court of appeals.

Any suggestion that this was an "easy" case for conviction does less than justice to the record. Without embarking upon what necessarily would be a long statement of the facts contained in the 12,000 page record of this case, we point to objective indicia which show that this was indeed a "close" case.

1. The majority below clearly regarded it as a close case. They referred to it in the opinion denying rehearing as "a criminal case so close as this" (App. 42a). Even the dissenting judge conceded that the government's evidence was "not overwhelming" (App. 33a).

2. In denying rehearing, the majority below noted that, although the court had not reached the defendants' contention as to insufficiency of the evidence, the majority now inclined to the view "* * * that there was insufficient evidence to warrant submission to the jury of the issue whether [Bristol] had conspired with Pfizer and Cyanamid to exclude others from the tetracycline market." (App. 42a)*

3. The jury's deliberation extended over a period of two days and late into the night of each. It twice requested to be read parts of the evidence and to be given some of the exhibits (R. 5071a).

4. Prior to the indictment herein, essentially the same charges and evidence were the subject of a Federal Trade Commission hearing even more lengthy than the trial below. *Matter of American Cyanamid, et al.* (FTC Docket No. 7211). The Hearing Examiner

* This statement by the majority below expressly refutes the petitioner's assertion that "there can be no question that the proof here supports the jury's verdict" (Pet. 15).

in a 195 page Initial Decision discussing the evidence in detail concluded that none of the charges had been sustained.

5. On an appeal to the Commission, the Initial Decision was unanimously affirmed as to the exclusionary aspects of the conspiracy charge but not as to the pricing aspects (63 FTC 1747). The Commission's decision as to the pricing aspects was vacated by the Sixth Circuit on the ground that the Chairman should have disqualified himself (363 F.2d 757). In subsequent proceedings before the Commission the earlier findings as to price fixing were dropped by a 2-2 vote (Trade Reg. Rep., 1967-70 Transfer Binder, ¶ 18,077).*

Summary of Argument

This is not a proper case for review by the Supreme Court. The decision below turned almost entirely on the particular facts of this case and the treatment thereof by the trial court in instructing the jury. No important questions of law are presented to this Court. Moreover, the decision merely remanded the case for new trial; and questions not reached by the court of appeals may well require a new trial even if the present decision were reversed. There are no reasons of public policy calling for departure from the standards set out in Rule 19 of this court (Point I).

The court of appeals applied a proper standard of review and correctly held that errors in the conduct of the

* The Commission did reaffirm findings that Pfizer and Cyanamid separately had misconducted themselves before the Patent Office. Orders entered pursuant to this finding were upheld on appeal. 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

trial, when taken as a whole, deprived the defendants of a fair trial. (Point IIA)

Evidence favorable to the defense was dealt with in such a way as to discourage the jury from giving it adequate attention. This was true of (i) the evidence as to the parallel conduct of Parke, Davis & Company which was affirmatively asserted by the government (without the knowledge of the jury) not to have been a conspirator, and (ii) the testimony of the principal officers of the defendants about certain meetings which were of crucial importance in the case. (Point IIB, 1 and 3)

By contrast, inflammatory evidence heavily relied on by the prosecution was emphasized and its limited significance in the case was not made clear. This was true of evidence as to alleged profiteering and alleged misconduct in the Patent Office. (Point IIB, 2 and 4).

Certain patent licenses having a vital importance in the case were described in the charge in a way which misinformed the jury as to their legal effect. The misleading nature of the charge in this respect was recognized by Judge Hays as well as by Judges Moore and Friendly. (Point IIB, 5)

The trial court failed to make clear to the jury that nearly all of the evidence as to Bristol's market behavior related to a period when it admittedly was not a conspirator. This error was compounded by an instruction which seemed to leave the jury free to find a conspiracy involving Bristol during a period when it was admittedly innocent. The trial judge himself conceded that this part of the charge might have had the effect of misleading the jury. (Point IIB, 6)

ARGUMENT

I.

No Adequate Reasons Are Given for Granting the Petition and There Are Affirmative Reasons for Its Denial.

Rule 19 of this Court sets forth "Considerations Governing Review on Certiorari." Not one of the reasons set forth in the Rule is applicable to this case. Indeed, the petition concedes that

> "On its face, the initial opinion of the court of appeals appears to involve only the application of settled principles of antitrust and criminal law to these particular facts; it does not cite a single decision." (Pet. 13)

There are, moreover, at least three affirmative reasons why the petition should be denied.

(1) The errors which the court of appeals found in the charge to the jury were either errors of fact—instances where the trial judge had misinformed the jury as to the evidence, over-emphasized some evidence and disparaged other evidence, and failed to give proper guidance in complex factual areas—or involved the now conceded mischaracterization of the legal effect of certain patent licenses.

(2) The decision below did not end the case, which was remanded to the district court for a new trial.

(3) The court of appeals did not consider all the grounds for reversal urged by respondents. The majority noted that the respondents had advanced "many other contentions" which were not reached (App. 42a). These include assertions of errors in ruling on evidence, of additional errors in the charge, and of error in permitting the case to go to the jury at all. Thus, if the decision below were reversed, the court of appeals "would be obliged to consider" the other contentions of respondents which have not been passed upon (App. 42a). As to one of those contentions, the insufficiency of the evidence, the majority inclined to the view that it would require a new trial (App. 42a). Even a reversal of the decision below, therefore, would not bring finality but would only insure further appellate review which appears likely to end with a direction for a new trial in any event.

This Court has said: "We do not grant a certiorari to review evidence and discuss specific facts"* and where "the Court of Appeals [has] remanded the case, it is not yet ripe for review by this Court."** We are aware of exceptions to each of these general rules. But we submit that in the absence of extraordinary grounds, a petition should be denied which asks the Court to review a decision (1) dealing almost entirely with evidence and specific facts (2) which remands the case for a new trial where (3) a reversal would call for further appellate proceedings and the distinct possibility of a new trial.

In the face of these formidable obstacles to the issuance of the writ, the petition urges only (1) that this is an un-

---

* *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

** *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

usually "important" case (Pet. 13); (2) that it was tried by a "highly regarded district judge" (Pet. 13); and (3) that the standards established by the court of appeals for instructions to a jury will place a serious burden on antitrust enforcement (Pet. 14, 16).

These contentions do not survive analysis.

(1) There are no "important" legal issues involved, and such extrinsic importance as the case may once have had has been dissipated by intervening events.

During the indictment period there were only five companies making or selling tetracycline. This market structure no longer exists. As a result of the parallel Federal Trade Commission proceeding, any applicant may now obtain an unrestricted license under the tetracycline patent at a royalty rate of 2½%, and this patent now has less than one year to run. The patents on the other three drugs involved in the case have all expired. The result is that the market has been widely opened up, and in the case of tetracycline there are more than 50 companies making or selling it.

Most of the treble damage actions brought by plaintiffs who could have relied upon a conviction in support of their claims have been settled pursuant to offers made prior to the reversal. Most of these settlements have already been approved by the district court as fair and reasonable. 314 F. Supp. 710 (S.D.N.Y. 1970). The balance of the settlements are before the district court for approval. The court has not ruled on them, but has held a hearing at which no objections were raised. It is true that some cases have not been settled, but their pendency

does not indicate that this criminal proceeding remains important.*

(2) We concede that the district judge is "highly regarded," as we are sure petitioner would concede that Judges Moore and Friendly are "highly regarded." But this consideration surely should not influence the Court in granting or denying the writ.

(3) The decision below set no difficult or new standard for jury instructions. It cannot be seriously argued that prosecutions should be facilitated by upholding convictions where there has been a failure to afford a fair trial. The court of appeals demanded no more than the petition itself says is the duty of the trial judge—that is, "to explain fairly and clearly in a way that the average man can understand what the law is, what issues the jury must decide, and upon what basis it should do so." (Pet. 15)

In a recent brief successfully opposing petitions for certiorari by defendants whose convictions had been affirmed by the Third Circuit (*American Radiator & Standard Sanitary Corp.* v. *United States*, Nos. 1047-1050, O.T. 1970, *cert. denied*, 39 U.S.L.W. 3376 (March 1, 1971)), the government argued that jury verdicts will not be reversed "unless the reviewing court is persuaded that misconduct of the trial prevented the jury from determining the case on a dispassionate consideration of the evidence." (An-

* The *Amicus* brief filed herein by the seven states which declined to settle makes no claim that this case will have a direct bearing on their actions against defendants. Their primary contention is that the decision below will have a great effect on state law. This is difficult to believe, since the petitioner does not seriously argue that this case will have any great effect even on federal antitrust law.

swering Brief, p. 13) The court of appeals in the present case *was* so persuaded. The government in the *American Radiator* case urged that the Third Circuit "correctly applied this standard in discharging its difficult review function", and that therefore this Court should not review the case further (Ibid.). In the present case the court of appeals also discharged "its difficult review function," and there is no occasion for further review merely because the result was adverse to the government.

II.

The Decision Below Is Correct and Does Not Raise Points of Law Which Warrant Review by This Court.

A. *The Nature and Scope of the Decision*

There is not the slightest ground for suggesting that the court of appeals, in disregard of its appellate responsibility, fragmented the record and considered particular language in isolation instead of evaluating the charge in its entirety. On the contrary, the opinion reveals that the court weighed the charge as a whole in the light of the complexity and difficulty of this particular case and concluded that the errors in the conduct of the trial, "when taken as a whole, were sufficient to deprive the defendants of a fair trial." (App. 41a)

The court held that evidence favorable to the defense was inadequately dealt with, and was treated in a way which tended to mislead the jury as to its significance. Inflammatory material relied upon by the prosecution as circumstantial evidence supporting an inference of conspiracy was accorded much more generous and complete

treatment. The effect of one of the important agreements among certain of the defendants was affirmatively misstated in a manner which erroneously tended to support contentions of the government. Requests to charge which, if granted, would have made the total charge more balanced, fair and accurate, were denied. Thus the reversal was based upon the cumulative effect of numerous errors "when taken as a whole."

As the court of appeals recognized, this was a case in which the charge to the jury was of unusual importance.* In the mammoth record there was no direct evidence whatever of the conspiracy alleged; all the direct evidence was inconsistent with conspiracy. The written agreements among the defendants contained nothing that required explanation; on the contrary, the prosecution explicitly conceded that each of these agreements was lawful on its face (R. 280a).

The circumstantial evidence relied on by the prosecution was complex in nature** and could be properly evaluated by the jury only if it received from the court a charge which would provide a clear basis for appraising the meaning

---

* The jury requested and were given copies of the transcript of the charge for use during the deliberations (R. 5051a, 7345a). After the verdict, the jurors were given permission to take these copies home as a memento of the trial (R. 5077a). The importance of the charge was accentuated by the fact that the trial court over defense objections allowed almost two weeks to elapse between presentation of the last evidence and submission of the case to the jury (R. 4606a-14a), as a result of which memories of the evidence must have faded and heavy reliance must have been placed on the court's comments.

** As one juror put it in a note to the court during trial, "* * * the dramatis personae is large, the language unfamiliar, the plot winding and convoluted, the actors sometimes slurring and the text very long." (R. 2388a)

and significance of the evidence. The gist of the decision was that the trial court's treatment of the various subjects of evidence did not provide the jury with such an adequate guide for their deliberations, and, indeed, dealt with a number of subjects in ways that were prejudicial to the defense.

B. *Particular Defects in the Trial Found by the Court of Appeals**

1. The trial court's treatment of the evidence as to Parke, Davis

The market involved in this case consisted of four broad spectrum antibiotic drugs, only three of which were produced or sold by any of the defendants. The fourth, Chloromycetin, was manufactured and sold by Parke, Davis & Company and accounted for some 24% of all sales of broad spectrum antibiotics during the indictment period (Pet. 4-5; R. 10244a). These four drugs were "clinically interchangeable" (Pet. 4).

One of the principal circumstances relied upon for an inference of conspiracy was the fact that the defendants followed substantially parallel policies and practices in the marketing of their broad spectrum antibiotics. Each refrained from granting patent licenses or from selling its patented products in bulk, save in exceptional circumstances. Their list prices were substantially identical and remained constant over a considerable period of time.

Government counsel argued strongly that this market behavior of the defendants was evidence of conspiracy not to grant licenses, not to sell in bulk and to fix and maintain

* We deal with these rulings in the same order as the petition.

prices. A necessary premise of this contention was that a company acting independently and without conspiracy would have acted differently.

The validity of this premise was put in question by the undisputed evidence as to the market behavior of Parke, Davis. Without the knowledge of the jury, which was not present, government counsel affirmatively asserted that it was not a party to the alleged conspiracy—it "absolutely was not" a conspirator (R. 4527a). And the undisputed evidence showed that Parke, Davis did the very things that were relied upon as evidence of conspiracy on the part of the defendants: it granted no patent licenses, it made no sales in bulk and its list prices were identical to those of the defendants for nine years through the middle of 1960.

Parke, Davis' status as a non-conspirator was stated unequivocally during the trial (but out of the jury's hearing) as follows:

> "The Court [addressing government counsel]: • • • Let me ask you: What do you think about the situation of Parke, Davis in this case? There has been a memorandum that you haven't responded to about the significance of Parke, Davis' conduct, same prices, same general business behavior, there is no charge that it is a conspirator and I think I can fairly read the statement of the Government, as being a concession that Parke, Davis was not a conspirator.
>
> "Mr. Sklarsky: It absolutely was not, your Honor. We state that on the record.
>
> "The Court: You not only concede that, you assert it?
>
> "Mr. Sklarsky: Yes, your Honor." (R. 4526a-27a)

In the same colloquy the trial court stressed the difference between such an affirmative assertion of innocence and

a mere failure to indict. When government counsel suggested that the jury simply be told that the fact that Parke, Davis was not indicted was of no consequence, the court responded:

> "The Court: No, but I can't let it go at that, when you have announced on the record that Parke, Davis was not a conspirator.
>
> "Mr. Sklarsky: Of course, your Honor.
>
> "The Court: You haven't just said, 'We didn't indict Parke, Davis.' That might be different. But you have stated that Parke, Davis was not a member of this conspiracy.
>
> "Mr. Sklarsky: That is right.
>
> "The Court: And then the evidence shows that it does many things similar to those proved against these defendants." (R. 4528a)

There was in this case, therefore, an admittedly independent and nonconspiratorial model with which to compare the behavior of those accused of conspiracy. The defendants intended to rely heavily upon the argument which had been foreshadowed by the trial court itself in the colloquy as follows:

> "Why shouldn't [the defendants] argue that this one large company, comprising a fourth or more of the market, you allege, behaving in very similar ways, has been declared by the Government to be a non-conspirator which helps to show that other people, behaving the same way, ought also to be viewed as not being conspirators?" (R. 4528a)

The jury was effectively prevented from considering such an argument by the court's treatment of this subject in the charge to the jury and by its rulings as to the scope of permissible argument.

1. The defendants requested an instruction which would have referred to the market behavior of Parke, Davis and would have told the jury that they were

> "entitled to consider the extent to which the evidence may show that Parke, Davis engaged in conduct which the Government claims proves conspiracy, and the further fact that no one claims that this conduct by Parke, Davis was pursuant to the conspiracy claimed by the Government." (R. 5555a)

The failure of the trial court to give the substance of this requested charge was found by the court of appeals to have been prejudicial (App. 24-26a).

2. Matters were made worse by the treatment of the Parke, Davis evidence in the charge as actually given. After referring to the evidence as to that company and stating that it was not alleged to have been a member of the conspiracy charged by the government, the court proceeded as follows:

> "Now, insofar as Parke, Davis and its activities were material factors in the market which concerns us in this case, the facts about that subject have been placed before you and are part of the total evidence you may consider in reaching your judgment. However, the fact that Parke, Davis has not been indicted and is not a defendant has no relevance whatsoever in any direction as a fact in itself. There is no profit here in speculating as to why Parke, Davis was not indicted. Parke, Davis is not on trial here, and the verdict concerning the defendants which are on trial must be based in the end on the law and the evidence relating to them as they have been presented to you in this courtroom." (App. 109a)

This passage stressed the failure to indict and made no mention of the concession that Parke, Davis was not a conspirator, although in the earlier colloquy in chambers (quoted *supra*, pp. 13-14) the court had recognized that the concession was more significant than the failure to indict. The charge given seemed to suggest that there was some reason for nonindictment which was not relevant to the jury's considerations and as to which the jurors were not to speculate. And it went on to say that the evidence upon which the jury should focus was the evidence as to the behavior of the defendants rather than the evidence as to the behavior of Parke, Davis. The charge did not inform the jury of the true significance of the evidence as to Parke, Davis, and its net effect was probably to prevent the jury from giving the weight to that evidence which might properly have been given to it. The court of appeals concluded that it seemed "impossible to deny that the treatment which the charge gave to the highly important Parke-Davis defense alone might well have prejudiced the jury's judgment." (App. 42a)

3. Moreover, in connection with the rulings on requests to charge the trial court placed certain limitations on the extent to which defense counsel could make arguments based upon the Parke, Davis evidence (R. 4646-47a). The exact extent of the limitations has never been entirely clear. In part at least, the trial court relied on the proposition that there was no presumption of innocence attaching to Parke, Davis, because it had not been indicted. Whether or not this was well founded, there was no necessity for injecting the question. The evidence as to Parke, Davis was relevant because that company was affirmatively as-

serted by government counsel absolutely not to have been a conspirator. This was true whether or not there was a presumption of innocence. The effect of the trial court's ruling was to inform defense counsel that arguments on this subject would be made at their peril. This had a substantial effect on the further conduct of the trial.

The petitioner contends that the jury must have considered the evidence relating to Parke, Davis because twice during the deliberations it requested evidence relating to that company (Pet. 21). It must be remembered, however, that each juror had the text of the charge before him during the deliberations. This must have been referred to, since the jury asked for the evidence by referring to page and line numbers of the transcript of the charge (R. 5071a). It is therefore clear that the jury could not have considered the evidence with a proper understanding of its significance.

2. The trial court's emphasis on assertions of profiteering

Despite the petitioner's implications to the contrary, the court of appeals did not pass on the admissibility of the evidence received as to costs and profits; rather, the court found that the trial court had unfairly emphasized this evidence. The petitioner's argument is basically designed to try to show that the evidence was relevant and that the trial court handled it fairly. The petitioner does not come to grips with the key to the court of appeals' decision, namely, that the constant emphasis on the allegations of profiteering, while at the same time the evidence relied upon by the defendants was being slighted and downgraded, presented the real possibility that the jury was diverted from consideration of the true issues.

The contention that defendants earned "unreasonably high" profits was constantly repeated by the government at trial. It bore little relationship to the economic theory espoused by the government at trial. It bore a close relationship, however, to the obvious sensitivity of the public to charges of profiteering by pharmaceutical manufacturers. Whatever may be the relevance of the cost and profit evidence (a point not decided by the court of appeals), there can be no doubt that the constant emphasis on allegations of profiteering in this trial was highly damaging to the defense. This loomed especially large in a case where the instructions to the jury seriously undermined the evidence relied upon by the defendants.

The margins of "profit" stressed by the government were the differences between bare production cost and selling price, without regard to the other necessary items of expense. The petitioner asserts that the facts as to the full costs of these drugs were kept from the jury "as a result of the defendants' own choice" (Pet. 23). In fact, the defendants sought to introduce studies showing the full costs, through government witnesses who had prepared them. Some of the studies were excluded on the ground that the witnesses were not the proper persons to authenticate them (R. 1847-49a). Others were excluded on the even more astonishing ground that the government had not had adequate opportunity to check the studies—which had been in the government's possession for seven years (R. 1986-90a). Despite the erroneous exclusion of these studies, the petitioner would place an obligation on the defendants not merely to put on a defense case but to put on a defense case to correct errors committed by the trial court.

3. The trial court's treatment of the officers' testimony

An understanding of the defects in the charge with respect to testimony of officials of the defendants requires a review of the subject matter and scope of their testimony, which in this brief can be given only in a most condensed form.

The most important episodes developed in the evidence were two sets of meetings between principal officials of defendants.

> (a) There were two meetings in November 1953, attended by top officials of Pfizer and Cyanamid, at which agreements were negotiated to clear up the patent block between the two companies and to settle the impending patent interference between them.
>
> (b) Some two years later, in December 1955, there were meetings between top officials of Pfizer and Bristol at which they negotiated and agreed upon a settlement of the patent infringement suits that had been brought by Pfizer against Bristol, Squibb and Upjohn.

The importance of these meetings was stressed by government counsel at all stages of the case. Paragraph 27 of the bill of particulars alleged that the arrangements made between Pfizer and Cyanamid in the meetings of November 1953 "initiated the conspiracy" (R. 298-300a). And paragraph 2 of the bill of particulars alleged that Pfizer and Cyanamid conspired "beginning in about November 1953" (R. 278a). The same paragraphs of the bill of particulars alleged that Bristol joined the alleged conspiracy "beginning in or about December 1955," and referred to the "illegal arrangements" negotiated between McKeen of Pfizer and Schwartz of Bristol in December

1955. It is undisputed that these passages in the bill of particulars refer to the meetings that have been described above.

This theory of the case was adhered to by the government at the trial. In his opening statement government counsel placed the formation of the conspiracy at one of the meetings of December 1953 in the following words:

> "• • • A meeting took place between Mr. McKeen of Pfizer and Mr. Malcolm of Cyanamid which the government contends resulted in an illegal agreement to violate the antitrust laws." (R. 1484a).

As to Bristol's adherence to the alleged conspiracy, government counsel told the jury in summation:

> "• • • [U]ntil the time they made that deal—Schwartz made that deal with McKeen in December 1955, there is nothing about the activities of Bristol that we criticize or say are illegal • • •." (R. 4867a)•

The importance in the case of the three principal officers is emphasized by the facts that each of them was personally indicted, that paragraph 27 of the bill of particulars alleged that each of them was responsible for the pricing policy of his company, and that government counsel asserted in argument throughout the trial that these men had formed or joined the conspiracy on behalf of their respective companies.••

• To the same effect, see also 1106-07a, 1130-31a, 1482a, 1495-96a, 4520-21a, 4829-31a, 4853-54a, 4999-5000a.

•• The charges against the individuals were dismissed by reason of their having received statutory immunity when the government, after their indictment, required them to testify before a grand jury.

Whatever may have been the possibility that a conspiracy could have been found to have arisen at some different time, or from the conduct of other people, the petitioner cannot escape the fact that at every stage of the case the government was seeking to establish a conspiracy initiated or joined by the principal officers of the companies at the meetings alleged. It follows that the truth as to what happened at these meetings was of crucial importance in the case. As the court of appeals concluded, the testimony about the meetings "was vital to any jury decision as to the existence of a conspiracy" (App. 16a).*

The government called as witnesses every officer of a defendant who attended any of the meetings, namely McKeen and Powers of Pfizer, Malcolm and Martin of Cyanamid and Schwartz of Bristol. Each of these men testified fully and in detail about the meetings that he attended; their testimony on this subject appears on 242 pages of the record. The questions put to them by both government and defense counsel explored in depth the business situations which gave rise to the meetings, the objectives of the respective parties, the matters discussed, the things said, the points agreed upon and the extent, if any, to which the terms of the alleged conspiracy were among the subjects discussed or agreed upon. The written agreements which resulted from the meetings were put in evidence and their terms were discussed. Each of these agreements was conceded by government counsel to be lawful on its

---

* The Federal Trade Commission Hearing Examiner relied on similar testimony in dismissing all charges of conspiracy and said:

"The witnesses called by respondents, particularly their principal officials, impressed the undersigned as being candid, straightforward, honest and credible."

face (R. 280a); and in important respects they were inconsistent with the existence of the conspiracy alleged.

The treatment of this evidence in the jury instructions was neither fair nor accurate. After charging that the conspiracy allegedly began at certain meetings and that the meetings could have provided the opportunity for conspiracy, the court instructed the jury as to the testimony of the officials in such a way as seriously to misdescribe and undermine this evidence. (The passage in question is the two full paragraphs at App. 108a.) Although language similar to that used by the court might correctly describe testimony in some other case, its use here was highly erroneous.*

This passage described the testimony so inadequately as to be misleading. The witnesses' complete and detailed account of what actually happened at the meetings was characterized as denials of illegal agreements "in broad terms" and as mere "assertions of innocence". This is not at all what the testimony amounted to. The accompanying comments on the testimony, most of which suggested reasons for giving it little weight, did not correct the erroneous description of its content.

---

* A similar charge was upheld in *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 39 U.S.L.W. 3376 (March 1, 1971), but as the government's petition (p. 26) recognized, that decision is not in conflict with the court of appeals' decision here. In that case the defendants failed to preserve the issue by objecting to the charge and, in addition, the Third Circuit found the cases "clearly distinguishable" on their facts. 433 F.2d at 201. The evidence of conspiracy there was direct and not circumstantial, as here, and the court of appeals described this evidence as "compelling," while the Second Circuit characterized this as a "close" case (43a).

If it be said that the jury could be counted on to remember that the testimony was more substantial and affirmative than the trial court indicated, it should be borne in mind that the last testimony about the meetings had been completed 37 days before the charge was given to the jury. During the interval the jury had been listening to voluminous evidence about fermentation chemistry, about complex proceedings in the Patent Office, and to extensive closing argument by the government about these matters and about matters relating to production costs, selling prices, etc. Also noteworthy is the fact that the charge concerning the officers' testimony was preceded by a lengthy discussion of the content and significance of the evidence on these other matters with which the jurors had been occupied for so long. As to the officers' testimony, the jury was not helped in reconstructing the scope and content of the evidence but was given a serious understatement of its nature and effect.

A further defect in this portion of the charge was the suggestion by the trial court that the testimony of the officers was somehow inconsistent with earlier statements made by them. The jury was told that "the things the defendants did and said at the time may in such a case be weightier than the things they say thereafter". The testimony of the officers stated in detail what "the defendants did and said at the time". There was not a scrap of evidence, written or oral, to suggest that anybody representing any defendant had made any statement inconsistent with what was asserted to have been said and done at the meetings. The inconsistency suggested by the charge simply did not exist.

This part of the charge may well have been confusing to the jury for the further reason that it brought up the question whether it would be a defense "that the conspirators did not believe they were violating the law or intend to commit such a violation". This would be relevant only if one of the "conspirators" had testified that he did not believe that he was violating the law or intend to commit such a violation. There was no such testimony from any of the witnesses. None of them said anything about his views or intentions as to the legality of his conduct.

Another important objection to this part of the charge was that the jury was given no guidance whatever as to what portions of the testimony the trial court deemed to have reflected "legal" rather than "factual" contentions. The court was expressly addressing itself to whether the jury should "overlook or reject" the testimony. In this context the jury was told that "assertions of innocence by the officers may reflect partly legal as well as factual contentions". It had been made clear to the jury that it must take its law from the court (App. 44a); it was therefore its duty to "overlook or reject" that part of the testimony which consisted of legal contentions. There was nothing in the charge which would give the jury any basis for differentiating between the legal and the factual. The jury was thus in the position of having been told that it might well have to reject some part of the testimony without any guidance as to how this part was to be identified. In these circumstances the easiest course for the jury was to reject it all.

The petitioner's basic answer to the court of appeals' finding of error is reliance on the truism that a finding of "agreement" under the Sherman Act must rest on mixed

questions of fact and law. The decision is in no way contrary to this rule of law.

The court of appeals, we submit, was amply justified in its conclusion that the charge "slighted and rather deprecated" the testimony of the officials (App. 16a).

4. The trial court's emphasis on assertions of patent fraud

In view of the trial court's handling of the evidence which was vital to the defense case, its emphasis on allegations of patent fraud also was likely to mislead the jury. The Patent Office evidence had indirect relevance at best to the basic conspiracy charges, since imposition on the Patent Office was not alleged to be one of the terms of conspiracy and since the government conceded it had no evidence that the defendants had conspired to defraud the Patent Office (R. 4135a). The government's evidence as to alleged patent fraud related to *ex parte* activities of the companies in pursuit of their own patent applications; even if fraud had been proved, an inference of conspiracy would not necessarily follow.

The government was frank to admit that it stressed the evidence to cast a bad light on the defendants. In his summation, government counsel indicated that he would deal with this evidence in some detail "since it reflects upon the personnel involved in some way" and because "anybody guilty of [patent fraud] certainly has a reflection cast upon them" (R. 4883a). The stress on this evidence in the summation and the charge compounded the prejudice caused by the trial court's inadequate and misleading treatment of evidence favorable to the defense.

Upon the whole record, the court of appeals concluded that the charge "virtually diverted" the trial "from an antitrust conspiracy case to a patent fraud case" (App. 18a).

5. The trial court's treatment of the patent licenses to Squibb and Upjohn

A key issue in the case centered around licenses granted by Pfizer to Squibb and Upjohn which permitted those companies to use and sell tetracycline, but did not expressly grant manufacturing rights. Both the majority below and the dissenting judge agreed that these licenses contained "no affirmative restrictions" (App. 28a, 37-38a); and this view is now accepted by the petitioner (Pet. 28). But in his instructions the trial judge mischaracterized these licenses as containing "a restriction forbidding manufacturing by Squibb and Upjohn" (App. 95a) and a "limitation on Squibb and Upjohn, which barred them from manufacturing" (App. 95a). This mischaracterization was relied on by the court of appeals in its reversal and also was recognized by Judge Hays in his dissent:

> "The instruction might have been construed by the jury to mean that but for the restriction Squibb and Upjohn would have had the right to manufacture tetracycline, whereas in fact there would have had to be a specific grant of permission." (App. 37a)

The petitioner, in an attempt to minimize the impact of the mischaracterization upon the jury, argues from another portion of the charge "explaining a patent monopoly" that it "was made clear to the jury" that the licenses "contained

no affirmative restrictions" (Pet. 28).* This contention, however, is at odds with the trial court's own view as expressed during argument on defendants' exceptions to the charge.

> "Mr. Clark: * * * In discussing the licenses that Squibb and Upjohn ultimately got, I believe your Honor told the jury that those licenses precluded or barred Upjohn and Squibb from manufacturing.
>
> "The Court: I said they did contractually preclude or at least I meant to say it.
>
> "Mr. Clark: But we except to that." (R. 5019a)

It cannot now fairly be argued that the jury understood the charge differently than the trial judge himself intended.

The jury had neither the competence nor the superior wisdom to correct or disregard the trial court's legal interpretation of the Squibb and Upjohn licenses as restricting manufacture, an interpretation which, Judges Moore, Friendly and Hays all agree, was erroneous as a matter of law.

It is no answer to so basic an error for the petitioner now to point to other statements in the instructions and contend that they must be presumed to have neutralized whatever harm the error may have caused. Although the jury was instructed that none of the written agreements were unlawful in themselves, this was of little moment so far as the Squibb and Upjohn licenses were concerned in face of the clear path to conviction which the error in the charge provided. As pointed out in the court of appeals opinion:

---

* The government took an inconsistent position in its summation to the jury. (R. 4877-78a, 4880-81a)

> "the term 'restriction' was used alternately to characterize the licenses and to describe what Pfizer and Bristol were forbidden to agree on [*]. The net result was that the charge might be read to contain this syllogism: Pfizer and Bristol were forbidden to agree to restrict licenses to others; the licenses given imposed restrictions on Squibb and Upjohn; Pfizer and Bristol agreed on those licenses; therefore, Pfizer and Bristol did what they were forbidden to do." (App. 29a)

In his dissent, Judge Hays, while conceding error in the instruction, states

> "It seems to me to be quite unlikely that the jury was seriously misled by this instruction." (App. 37a)

With deference, we believe it plain that it could not have been other than "serious" for the jury to have been misled here. For the point on which it was so clearly misled was in an area which the instruction itself stressed as "vital" and "critical" to the issue of whether Bristol conspired with Pfizer and Cyanamid (App. 95a).** The court of appeals (without reaching the other basic and prejudicial errors in the instruction on this point, errors also argued on the appeal) rightly refused to presume such error harmless.

6. The trial court's treatment of the evidence as to Bristol's concededly non-conspiratorial conduct

The government asserted that Bristol entered the alleged conspiracy at a specific meeting held over two days, Dec. 14-15, 1955. It asserted that prior to this date "there is

---

* Compare App. 64a, 71-2a, 95a.

** See *Bollenbach* v. *United States*, 326 U.S. 607, 613 (1946).

nothing about the activities of Bristol that we criticize or say are illegal" (R. 4867a). Nevertheless, virtually all of the evidence relating to Bristol concerned its activities prior to this meeting. The court of appeals said that this circumstance called for "the clearest instructions that the jury should not consider Bristol's part in any of the events prior to Dec. 14-15, 1955 as proof of Bristol's being in any conspiracy" (App. 31a). Such instructions were requested (R. 5586-88a), and the trial judge had said that he would include in his charge the substance of this request (R. 4658-59a). Thereafter, contrary to his earlier ruling, the trial judge failed to include the substance of this request in his charge. And he compounded the error by saying to the jury that "it is not necessary that the precise dates or extension of the conspiracy throughout the period be proved in order to establish the charges" (App. 68a). The trial judge conceded subsequently that this portion of the charge might have a "possibly misleading impact" and the "incidental result of misleading the jury" (R. 5096a, 5097a). But he had refused to correct it.

The government mischaracterizes the holding of the court of appeals in saying that it was inconsistent with the settled principle that evidence of acts prior to the formation of a conspiracy is admissible to establish motive, intent, etc. (Pet. 29). That point is not in issue here. We are not dealing with the admissibility of evidence but with a misleading charge. And the government's only answer to the contention that the charge was indeed misleading is once again to point to other portions of the charge and to statements of counsel in support of the unprovable assertion that despite the misleading instruction, the jury was not on the whole misled (Pet. 29).

CONCLUSION

No questions of law or considerations of public interest make Supreme Court review appropriate at this time. Moreover, the court below was correct in holding that basic errors require a new trial. Accordingly, the petition should be denied.

Respectfully submitted,

JOHN E. F. WOOD
140 Broadway
New York, N. Y. 10005
Attorney for Respondent
Chas. Pfizer & Co., Inc.

Of Counsel:

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD

CONNOLLY, BOVE & LODGE

ROY W. MCDONALD
2 Wall Street
New York, N. Y. 10005
Attorney for Respondent
American Cyanamid Company

Of Counsel:

DONOVAN LEISURE NEWTON
& IRVINE

MERRELL E. CLARK, JR.
40 Wall Street
New York, N. Y. 10005
Attorney for Respondent
Bristol-Myers Company

Of Counsel:

WINTHROP, STIMSON, PUTNAM
& ROBERTS

FISH & NEAVE

March 31, 1971